

Mistaken Payment of Another's Debt—Is there an equitable solution?

A Reflection on *Westpac Banking Corporation v Rae*

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Introduction

There are equitable doctrines under which a person who pays the debt of another without authority may be allowed the advantage of the payment.¹

I owe \$500 in respect of a legitimate debt to ABC. By mistake,² but nevertheless with the object of paying the debt, you pay this money to ABC. Can you recover this money from me? As Professor Birks and Mr Beatson have observed, the “common-sense view” is that in this situation my debt to ABC has been discharged by your payment.³ ABC has received payment and will in all probability regard the matter as closed. As I have now been saved paying a debt with the associated preservation of my wealth, a common-sense assumption is that you should be able to recover your payment from me.

Contrary to these “common-sense” views and assumptions, however, the orthodox approach of the common law is that the mere fact of your payment of my debt and its acceptance by ABC does not discharge the debt. Pursuant to this approach, except in those situations in which you were legally compelled to make the payment, the debt will only be discharged if I ratify your actions and thereby adopt the payment. Reflecting the orthodox legal approach, current restitutionary theory suggests that if I do not ratify your actions, restitutionary relief against me is unavailable to you. Since the debt has not been legally discharged, it is still owed by me with the consequence that I have not been enriched by your actions, and without an enrichment restitutionary relief is simply unavailable.

In *Westpac Banking Corporation v Rae*⁴ Holland J challenged current restitutionary theory by suggesting both that equity may regard a debt as being discharged in situations in which the common law may not, and that underlying equity's approach may be “the general principle of unjust enrichment.”⁵ The equity revealed by Holland J is the subject

¹ *Shapera v Toronto-Dominion Bank* [1971] 1 WWR 442 (QB Manitoba), 448 per Tritschler CJQB.

² For the purposes of this article it is assumed that the mistake is of such a nature so as to justify restitutionary relief.

³ P Birks and J Beatson, “Unrequested Payment of Another's Debt” (1976) 92 LQR 188, 188. This article has been reprinted in J Beatson, *The Use and Abuse of Unjust Enrichment* (1991) 177.

⁴ [1992] 1 NZLR 338.

⁵ *Ibid*, p 346.

of this article. While Watts has “concluded ... that Holland J’s conclusion ... is out of line with Commonwealth authority”,⁶ it is suggested that there is judicial support for his Honour’s suggestion and a place for it within restitutionary principles.

In Part I the orthodox legal approach and its influence on restitutionary theory is briefly examined. The aim of this examination is to provide the necessary background against which the equity revealed by Holland J can be assessed. Part II comprises an examination of the equity itself. At the outset it must be acknowledged that this equity was examined by the English Court of Appeal in *Re Cleadon Trust Ltd*⁷ and as interpreted by the majority (Clauson and Scott LJ), it does not have the significance which Holland J attributes to it. It is respectfully submitted, however, that the majority’s interpretation of the equity was coloured by their perception of an earlier and much criticized decision of that Court—*Falcke v Scottish Imperial Insurance Co*⁸—and that the interpretation of the equity advanced by Greene MR in his dissenting judgment in *Re Cleadon Trust Ltd* should be preferred. It is submitted that although the common law may not regard the non-officious payment of another’s legitimate debt as discharging that debt, equity may regard the debt as being discharged (and consequently enriching the debtor) and grant relief to the payer enabling him or her to recover that payment (or enrichment) from the debtor.

Part I: the orthodox legal approach

As already noted, the orthodox approach of the common law to the problem of the payment of another’s debt is that the mere fact of payment and its acceptance by the creditor does not discharge the debt. As summarized by Birks and Beatson, the orthodox approach of the common law is that:⁹

[P]ayment of another’s debt by a voluntary intervenor does not itself discharge the debt, but, provided the payment is made on account of the debt, the debtor may obtain his discharge by adopting the payment of his debt at any time before the transaction between the creditor and intervenor is undone. The intervenor can be said to pay on account of the debt whenever (a) he intends to discharge a debt and (b) the debt which he intends to discharge is unambiguously the debt in respect of which the payment is sought to be adopted.

Returning to first impressions, the requirement that the debtor must ratify the payer’s action before the debt is legally discharged appears to unduly favour the debtor. As

6 PG Watts, “Restitution” [1991] NZ Recent Law Review 419, 441.

7 [1939] 1 Ch 286.

8 (1886) 34 Ch D 234.

9 “Unrequested Payment of Another’s Debt” above, note 3, p 193. See *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, pp 695 and 699–700 and *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] 1 AC 643, p 663 for the application of the orthodox approach by Lord Goff of Chieveley. But see D Friedmann, “Payment of Another’s Debt” (1983) 99 LQR 534 for criticism of this approach. The approach advanced by Goff J (as he then was) in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* can be contrasted with that of Fox LJ (with whom Butler-Sloss and Beldam LJ agreed) in *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 451 (CA), 462 holding that an unauthorized payment by a bank was “[i]n practical terms” a payment with the account holder’s money conferring upon the account holder the right to bring an action for money had and received against the recipient of the money.

Professor Friedmann has commented,¹⁰ “the debtor need not react at all. He is unlikely to be sued by the creditor who has been paid off. He may enjoy the situation created by the payment” On deeper consideration, however, the merits of the orthodox legal approach become apparent. The debtor may dispute the quantum of the debt or the debt itself; alternatively he or she may have a counter-claim or set-off against the creditor. The requirement that the debtor must ratify the payer’s actions does protect what rights the debtor has against the creditor.

Underlying the orthodox legal approach is a fear that if the law regards an unauthorized payment of a debt as discharging that debt and conferring upon the payer a right of recovery against the debtor, the debtor may effectively lose the benefit of any rights which he or she may have against the creditor. As Beatson has observed, there is the fear that the debtor would be put to the “real procedural disadvantage” of having “to institute separate proceedings against his creditor.”¹¹

Another fear underlying the orthodox legal approach is that of officious behaviour—the person who meddles in a debtor’s affairs by paying the debtor’s creditors is to be discouraged. The significance of officious behaviour to the orthodox legal approach is displayed in an exception to the rule that the debt is only discharged by the debtor’s ratification of the payment. Irrespective of the debtor’s ratification, in the situation in which the payer has been legally compelled¹² to make the payment the common law regards the payment as discharging the debt. *Exall v Partridge*¹³ is the classic example of a situation in which a debt was regarded by the law as being automatically discharged. It will be recalled that in this case the plaintiff’s carriage while on the defendant’s leasehold premises had been distrained by the landlord. To recover his carriage the plaintiff was required to pay the defendant’s rental arrears. The plaintiff successfully recovered this payment from the defendant.

Premised upon the argument of subjective devaluation as developed by Professor Birks,¹⁴ current restitutionary theory mirrors the orthodox common law approach. As noted earlier, the debtor is deemed to have been enriched by the payer’s actions only when the

10 D Friedmann, “Payment of Another’s Debt” (1983) 99 LQR 534, 535.

11 Beatson, Postscript to “Unrequested Payment of Another’s Debt” above, note 3, p 203.

12 In *Owen v Tate* [1976] QB 402 Lord Scarman suggested that this exception may extend to situations in which although not legally compelled to make the payment, the payer made it because of some necessity and it was just for him or her to do so.

13 (1799) 3 Esp 8; 170 ER 520 (KB).

14 The argument of subjective devaluation is premised on the assertion “that benefits in kind [ie the receipt of goods or services or the payment of another’s debt] have value to a particular individual only so far as he chooses to give them value.” As Professor Birks explains in *Introduction to the Law of Restitution* (Paperback Edition 1989), pp 109–110:

What matters [to the recipient of a benefit in kind] is his choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it, is irrelevant to the case of any one particular individual. He claims the right to dissent from that demand. Market value is not his value. Suppose that without his knowledge his car has been serviced or his roof mended. There is a market in car servicing and roof mending. It is easy to find the market value of work of that kind, what the going rate is between reasonable people. But he says that he had decided to go in for do-it-yourself or to take the risk of disaster by doing nothing. Indeed to make his point he does not even have to say that he had actually decided, let alone prove that he had decided,

debt has been legally discharged. This occurs when the debtor ratifies the payer's actions (in restitutionary terms, when the debtor "freely accepts" the benefit), or alternatively when the debt is automatically discharged because it was paid under legal compulsion (in Birks' restitutionary terms, when the debtor has received an "incontrovertible benefit" in the guise of the anticipation of "legally necessary expenditure"). A critic of this theory is Friedmann. He suggests, that "recovery [by the payer] against the debtor was traditionally denied not on the ground that he received no benefit but because of the unsolicited benefits rule."¹⁵ Central to this challenge are Professor Friedmann's arguments, that "[i]t is generally in the interest of the creditor to accept payment by whoever it is offered"¹⁶ and, that "ordinarily a creditor who has been paid in full has no interest in pursuing his original claim, nor does he have a legal right to recover the same amount twice."¹⁷ Irrespective of whether the debtor ratifies the payer's actions, Friedmann argues that the debtor has received a benefit; for all practical purposes the debt has been discharged.

A recent expression of disenchantment with the orthodox legal approach has come from an unexpected direction—Professor Birks. In his *Introduction to the Law of Restitution* Birks suggests, that to "provide a much more stable basis from which to begin the inquiry" into whether restitutionary relief should be available, the general approach of the law should be to regard "the debt [a]s always discharged" by the payment.¹⁸

Returning to the orthodox common law approach and current restitutionary theory, if the debtor does not ratify the payer's actions he or she is not without a remedy; potentially the payer has a restitutionary cause of action for money had and received against the creditor premised upon a total failure of consideration. As Birks and Beatson have argued,¹⁹ "[a]lthough this restitutionary right is not copiously supported in authority, it is consistent with principle in that, once the debtor negatives his discharge, the consideration for which the intervenor paid totally fails."

to dissociate himself from the particular demand. For his point is sufficiently made by saying that he has continuing liberty to choose how to apply his particular store of value and that in the case of this car-servicing or roof-mending he simply had not made his choice.

For those readers interested in the argument of subjective devaluation, I examine it in a forthcoming article - "Restitution and the Argument of Subjective Devaluation; When is an enrichment not an enrichment?" to be published in (1993) 15 NZULR.

15 Friedmann, "Payment of Another's Debt" above, note 10, p 535.

16 Ibid, p 536.

17 Ibid, p 541.

18 Birks, *Introduction to the Law of Restitution* above, note 14, p 191.

19 Birks and Beatson, "Unrequested Payment of Another's Debt" above, note 3, pp 205; 193-4. Professor Friedmann challenges this argument on the basis that it "is predicated on the theory that the unauthorized payment did not discharge the debt and that such a discharge was the sole consideration promised by the creditor in exchange for the payment." In "Payment of Another's Debt" above, note 10, p 539 Professor Friedmann argues:

If the creditor abstains from pursuing his debtor and treats the debt as having been discharged, he does all that is and can be expected of him. It is unlikely that the parties had anything else in mind. It is, of course, conceivable that payment was made and received on condition that the debtor will assent to it. But there is no reason to imply such a condition. Under this view, there will be a total failure of consideration only if the creditor actually sues the debtor without the payor's consent.

From this summary of the orthodox approach it appears that the mistaken payer is protected; all that really matters to the payer is that the payment is recovered. Provided the payer sues the right party it appears that he or she will recover the payment. There are potential practical difficulties, however. As Holland J observed in *Westpac Banking Corporation v Rae*,²⁰ “any rights of recovery the ... [payer] has against the ... [creditor may not be] realistic”—the creditor may be insolvent. Alternatively, the creditor may be able to successfully raise a change of circumstances defence.²¹ For a number of reasons the payer may be unable to recover all or any of the payment from the creditor. It is submitted that to protect the payer against these risks and also to make the law more accurately reflect the expectations of the reasonable person, the law should recognize that in some circumstances extending beyond those of “legal compulsion” and “necessity” the debt is “discharged” and that the payer has a right of recovery against the debtor.

This submission leads us on to consider the equity recognized and applied by Holland J in *Westpac Banking Corporation v Rae* pursuant to which he suggested that Equity may regard the payment of another’s debt as discharging the debt. It may transpire that the “law” in the guise of Equity already reflects or has the ability to reflect the expectations of the reasonable person in this situation.

Part II: The “Equity”

In support of this equity Holland J relied upon the decision of Wright J (as he then was) in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*.²² Originally a sole trader, Mr Liggett had established the plaintiff company in which a Mr Melia acquired half the shares. Both men became the company’s directors and were the required signatories on company cheques. The company was insolvent from its inception, and, approximately two years later (and apparently with the intention of forcing the company to cease trading) Mr Melia refused to sign any more cheques. Mr Liggett continued to run the company however; he purported to make his wife both a director and authorized signatory for the purposes of drawing cheques, and he continued to order goods for the company—paying for these goods by way of company cheque. Although the cheques did not bear the required signatures—some were signed by Mr Liggett only and others by him and his wife—the defendant Bank honoured them. Subsequently the company brought an action for money had and received against the Bank. Recognizing “the equitable doctrine under which a person who has *in fact paid the debts of another without authority* is allowed to take the advantage of his payment”,²³ Wright J held that the Bank was justified in debiting the company’s account.

B Liggett (Liverpool) Ltd v Barclays Bank Ltd and this equity was considered by the English Court of Appeal in *Re Cleadon Trust Ltd*.²⁴ This latter case involved the claim of a Mr Creighton to prove in the liquidation of Cleadon Trust Ltd. Mr Creighton was a

20 Above, note 4, p 346.

21 In New Zealand there is a statutory change of circumstances defence—s 94B Judicature Act 1908. The House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 recently recognized a common law change of circumstances defence.

22 [1928] 1 KB 48.

23 Ibid, p 59 (my emphasis).

24 Above, note 7.

director of both that company and two of its subsidiary companies. The subsidiary companies became involved in a building development and Cleadon Trust Ltd guaranteed their undertakings as to the funding of this development. When the payments became due, however, neither the subsidiaries nor Cleadon Trust Ltd had sufficient funds to meet them and Mr Creighton provided the necessary funds to Cleadon Trust Ltd. Initially these payments were made by arrangement with the managing director of that company, but following his departure they were made by arrangement with the company secretary. Although the remaining two directors (one of whom was Mr Creighton) subsequently purported to confirm Mr Creighton's advances, their resolution was held to be invalid.²⁵

While all the members of the Court recognized the existence of an equity in the context of unauthorized loans (ie, loans to married women to pay for necessities, unauthorized borrowing by agents and ultra vires borrowing), they were divided over its exact nature and rationale. The majority—Clauson and Scott LJ—advanced a narrow view of the equity and rejected Mr Creighton's claim. Before we examine the differing interpretations of the equity advanced in this case, the unauthorized loan cases, providing as they do the early examples of the application of the equity, will be considered. In considering these cases it should be remembered that the courts were primarily concerned with determining the lender's claim for repayment of the unauthorized loans. As we shall see, a prominent factor in the courts' response to this issue was to consider the use to which the proceeds of the loan had been put.

1 *The unauthorized loan cases*

The first recognition of a right of recovery for lenders of unauthorized loans occurred in the context of loans made to married women to pay for necessities. Until the end of the nineteenth century married women lacked legal capacity to borrow money or incur debts. As the agent of her husband, however, the married woman could pledge his credit for the purchase of necessities. Despite this power, if the married woman purchased necessities and then borrowed money to pay for them, the loan was unenforceable at common law. As Turner LJ observed in *Jenner v Morris*,²⁶ a "court of law" could not give a remedy to the lender in this situation because, "because of the necessary forms of the action at law for the recovery of the money, ... [it] cannot look behind the advance and enter into the application of the money." To the extent that the proceeds of the loan had been "employed in paying for necessities", however, equity granted relief to the lender.

In *Jenner v Morris* the defendant had both given money to the plaintiff's wife with which she paid for "necessaries" and personally had paid a number of tradespeople who had supplied her with "necessaries". The equity was held to apply in both situations. Not only was the defendant entitled to recover from the husband the unauthorized loan, but he was also entitled to recover for the money which he had paid directly to the creditor, ie in

25 Pursuant to the company's Articles of Association, two directors were necessary to establish a quorum and no director could vote in respect of any contract or arrangement of which he or she was an interested party. Mr Creighton was an interested party with the result that there was no quorum when the resolution was made.

26 (1861) 30 LJ Ch 361, 362.

“discharging” the husband’s debt. As Lord Campbell LC observed:²⁷

Courts of law will not recognize any privity between the husband and any person who has supplied his wife with money to purchase necessities, or pays the tradespeople who have furnished them. Nevertheless, it has been laid down from ancient times, that a Court of equity will allow the party who has advanced the money which is proved to have been *actually employed in paying for necessities* furnished to the deserted wife, to stand in the shoes of the tradespeople who furnished the necessities, and to have a remedy for the amount against the husband.

In *Bannatyne v D & C MacIver*²⁸ it was recognized that similar equitable relief is available in the context of unauthorized borrowing by agents. In that case a Mr Hudson was the defendants’ agent. Without any authority to do so, Hudson borrowed money from a Mr Bannatyne, some of which he used to pay the defendants’ legal liabilities. To the extent that “the money [could] be shewn to have *been applied for the benefit of the defendants*, in paying claims for which they were legally liable” Collins MR held that Mr Bannatyne could recover it “upon equitable grounds”.²⁹ Romer LJ described the operation of the equity in similar terms:³⁰

Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, though the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has *in fact been applied in paying legal debts and obligations* of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

In *Reversion Fund and Insurance Company Ltd v Maison Cosway Ltd*³¹ the lender knew of the agent’s lack of authority to borrow. By a majority the English Court of Appeal nevertheless held that this knowledge was immaterial to the operation of the equity. Buckley LJ described the equity as follows:³²

The principle is that, where A has found money for payment of a debt due from B to a third person, and the money has been applied to the payment of that debt, A is entitled to say that B has had from him that money, because it has been applied in discharge of B’s debt, and therefore in equity B owes him the amount of money so applied.

In *AL Underwood Ltd v Bank of Liverpool and Martins*³³ the company was suing the Bank for the Bank’s conversion of a number of cheques of which it was the payee. These cheques had been deposited by the company’s director with the Bank for collection for the benefit of his personal account. One of the arguments raised by the Bank was that the

27 Ibid, p 362 (my emphasis).

28 [1906] 1 KB 103

29 Ibid, p 108 (my emphasis).

30 Ibid, p 109 (my emphasis).

31 [1913] 1 KB 364 (CA).

32 Ibid, p 376.

33 [1924] 1 KB 775.

director had used some of the proceeds from the cheques to pay the company's liabilities, and that to that extent its own liability to the company should be reduced. Applying "the equitable doctrines under which a person who *had in fact paid the debts of another without authority* was allowed the advantage of his payments",³⁴ the Court ordered an inquiry as to "whether the proceeds of any of the cheques converted were used to discharge liabilities of the company".³⁵

Similar equitable relief is also available in the context of *ultra vires* borrowing, and indeed in *Bannatyne v D & C MacIver*.³⁶ Collins MR drew support for the underlying principle from cases involving *ultra vires* loans. Unlike the situation in respect of loans to married women and the unauthorized-borrowing-by-agent cases, however, in the *ultra vires* cases the party which the lender was attempting to make liable for repayment of the loan was legally incapable of borrowing the money. As Lord Parker observed in *Sinclair v Brougham*,³⁷ such loans could not and did "not give rise to any indebtedness either at law or in equity on the part of [the] company". Because of the *ultra vires* rule the equity could not be implemented thorough validating the loan itself.

One of the first *ultra vires* borrowing cases was *In re Cork and Youghal Railway Co.*³⁸ The company having exhausted its borrowing powers borrowed additional funds from a Mr Lewis who in turn assigned some of these loans to third parties. The company was subsequently wound up and this dispute centred upon whether these loans should be repaid in priority to the claims of the shareholders. A complicating fact in this case was that Mr Lewis had offered what was in essence a revolving line of credit to the company; when his earlier loans matured Mr Lewis would grant further loans. In respect of those loans which "were paid directly to persons who were actual creditors of the company" Lord Hatherley LC observed that "there could be little or no dispute as to the right of Mr Lewis, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid."³⁹ Turning to the "revolving loans" Lord Hatherley considered that to the extent that the original loans had been "applied for the legitimate benefit of the Company",⁴⁰ for instance "in paying off debts which would not otherwise have been paid off",⁴¹ the lender could recover. In reaching this conclusion Lord Hatherley had posed the following question:⁴² "[T]he money having been *de facto* so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders?"

34 Ibid, p 794 per Scrutton LJ (my emphasis). Atkin LJ (p 799) expressed the equity in terms of whether the proceeds of the converted cheques were applied by Underwood "in the payment of liabilities of the company."

35 Ibid, p 795.

36 Above, note 28.

37 [1914] AC 398, 440.

38 (1869) LR 4 Ch App 748.

39 Ibid, p 759.

40 Ibid, p 760.

41 Ibid, p 761.

42 Ibid, pp 760-761.

In re Cork and Youghal Railway Co was considered by the English Court of Appeal in *Blackburn Building Society v Cunliffe, Brooks & Co.*⁴³ In delivering the judgment of the Court Lord Selborne LC described the operation of the equity in the context of *ultra vires* loans as follows:⁴⁴

I think the consistency of the equity allowed in the *Cork and Youghal Railway Company's Case* with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is: Has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose shall not retain that benefit so as, in substance, to make those other people pay their debts.

This passage reveals the tension between the equity and the *ultra vires* rules; the loan cannot be simply validated. To overcome this difficulty the equity is implemented through a form of "subrogation" in which the lender is subrogated to the personal rights of the creditor to sue the debtor.⁴⁵

2 *Re Cleadon Trust Ltd—the different formulations of the equity*

Returning to *Re Cleadon Trust Ltd*,⁴⁶ one of the arguments raised for Mr Creighton was that the equity revealed in the unauthorized loan cases applied. As noted by Clauson LJ, it was argued that this equity provided, "that a person who has in fact paid the debts of another without authority is entitled to recoupment as against that other."⁴⁷ While this expression of the equity is substantially similar to the expression of it by Wright J in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*,⁴⁸ the majority rejected it. Clauson LJ emphatically considered that, "[s]uch a doctrine would seem to be inconsistent with the decision of this Court in *Falcke v Scottish Imperial Insurance Co*,⁴⁹ and on that ground alone it would not seem open to this Court to accept it."⁵⁰

43 (1882) 22 Ch D 61.

44 Ibid, p 71.

45 A subrogation argument was rejected by the English Court of Appeal in *Re Wrexham, Mold & Connah's Quay Railway Co* [1899] 1 Ch 440 but as Lord Goff and Professor Jones note, in that case the unsecured lender was seeking to be subrogated to the creditor's security. See generally Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (3rd Edition 1986) pp 554-555.

46 Above, note 7.

47 Ibid, p 322.

48 Above, note 22.

49 Above, note 8.

50 Above, note 7, p 322.

Clauson LJ (with whom Scott LJ agreed⁵¹) considered that a common thread within all the unauthorized loan cases was that the borrowed money, “was expended in paying the quasi-borrower’s debts by or with the privity of a person who had authority to use the quasi-borrower’s money in paying the quasi-borrower’s debts.”⁵² The “clear equitable principle” underlying these cases was expressed by Clauson LJ as follows:⁵³

Let it be assumed that A requests B to advance money to C, A being a person who has no authority from C to make the request (whether because C is a company whose powers are limited in such a way as to make it ultra vires on C’s part to make such a request, or whether because A, though professing to act as C’s authorized agent to make the request, has in fact no such authority): let it be further assumed that B, in response to the request, in fact places the money under the control of C or C’s agents, and C, or an agent authorized by C to pay off C’s debts, uses the money or procures the money to be used in or towards discharge of C’s debts. On these assumed facts a court of equity will treat B as entitled to be recouped by C a sum equal to the amount so used in or towards discharging C’s debts. ...

It is to be observed that the equity cannot operate against C (the company or the principal) merely because C has in fact received a benefit from B’s action in providing the money: that fact alone, as *Falcke’s* case has settled (so far as this Court is concerned), would not set up an equity against C. *The equity must, it would seem, arise from the fact that C, by himself or by a person authorized to act, in the matter of payment of C’s debts, for C, has used the money so as to obtain a benefit for C.* The benefit has not been an unsought benefit conferred on C behind his back. It is a benefit which C has obtained for himself by using (either himself or by his agent) [B’s]⁵⁴ money as his own. It is his conduct in so using [B’s] money which makes it unconscionable that he should retain the benefit while refusing recognition of [B’s] just claim to recoupment.

Although recognizing that in *Cork and Youghal Railway Co, Reid v Rigby & Co*,⁵⁵ *Bannatyne v D & C MacIver, Reversion Fund and Insurance Co v Maison Cosway Ltd*, and *Jenner v Morris*, “the judges do not draw specific attention to the fact that in each case the money was expended in paying the quasi-borrower’s debts by or with the privity of a person who had authority to use the quasi-borrower’s money in paying the quasi-borrower’s debts”,⁵⁶ Clauson LJ cites them in support of his formulation of the equity.

Turning to *AL Underwood Ltd v Bank of Liverpool and Martins*, Clauson LJ suggests that the “inquiry [in that case] was directed on the assumption that it could be established that

51 Ibid, p 318.

52 Ibid, p 325.

53 Ibid, pp 322-324 (my emphasis).

54 Goff and Jones observe that although the report says A; it is plainly B whose money has been used to benefit C. *The Law of Restitution* above, note 45, p 552, n 8.

55 [1894] 2 QB 40. *Reid v Rigby & Co* predates *Bannatyne v D & C MacIver* above, note 28. Unauthorized borrowing was deposited into the principal’s bank account and then used by the agent to pay wages owed by the principal. The lender was held entitled to recover the money from the principal.

56 *Re Cleadon Trust Ltd* above, note 7, p 325.

Underwood had authority as between himself and the company to pay those debts.”⁵⁷ It will be recalled that in that case Scrutton LJ referred to the equitable doctrines as ones “under which a person who *had in fact paid the debts of another without authority* was allowed the advantage of his payments.”⁵⁸ On the assumption that Scrutton LJ had not “intended to express his adoption of any principle beyond that which can be deduced from the cases which he cites, namely, *Bannatyne v D & C MacIver* and *Reid v Rigby & Co*”, Clauson LJ rephrased this summary of the equity as:⁵⁹

equitable doctrines under which a person who had without authority provided money which in fact was used, *by a person having authority so to do*, to pay the debts of another was allowed the advantage of the payment.

Clauson LJ did recognize that in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, Wright J “seems to treat the case as one in which the difficulty was that Liggett had no authority to pay the company’s debts”.⁶⁰ To make this case “consistent” with his formulation of the equity, however, Clauson LJ suggested that:⁶¹

[T]here was, on the facts, strong ground for holding that [the company] ... could not repudiate Liggett’s authority to pay their legitimate debts, since he was conducting the business and the company received the goods so paid for, goods supplied for the purposes of the business, goods for the payment of which the company were held by the learned judge to be liable.

Scott LJ, focusing on the use of the word “discharge” by Wright J, also considered that *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* was consistent with the formulation of the equity advanced by Clauson LJ. He inferred that by “discharge” Wright J considered that the payments, “must be taken to have been made under Liggett’s authority to pay current debts when he had money of the firm’s out of which to pay them.”⁶²

In contrast with Clauson and Scott LJ, Greene MR took a wider view of the equity, observing:⁶³

With all respect to those who think otherwise, I do not take the view that the principle ... applies only in cases where the creditor has been in fact paid by the hand of a person having a general authority to pay the principal’s debts. There are, no doubt, weighty reasons which support this view. But I am unable to find that this has ever been considered to be a requirement in cases where the principle has

57 Ibid, p 326.

58 *AL Underwood Ltd v Bank of Liverpool and Martins* above, note 33, p 794 per Scrutton LJ (my emphasis).

59 *Re Cleadon Trust Ltd* above, note 7, p 326 (my emphasis). Clauson LJ then proceeded to suggest that “[s]o stated the doctrine would have fully justified the form of inquiry ordered, which was directed to ascertaining the circumstances under which the debts were paid.”

60 Ibid, p 327. Indeed this is the conclusion of Lord Goff and Professor Jones who observe that Liggett’s authority to pay the company’s debts “was never held to exist, and was clearly not regarded as important by Wright J; indeed, it can only be inferred from the fact that Liggett was in reality conducting the company’s business at the relevant time (Goff and Jones, *The Law of Restitution*, above, note 45, p 554, n 11)”.

61 Idem.

62 Ibid, p 318.

63 Ibid, p 305.

been discussed, although there may be other cases on the subject which I have not examined. Were such a requirement essential, it would, of course, greatly limit the application of the principle. For instance, if a director, having no authority to borrow on behalf of his company, borrowed money from a third person and himself applied it in payment of the company's debts, having no general authority to pay debts—and a director as such has not that authority—the third person could not recover. If, on the other hand, the director, having obtained the money, handed it to the company's cashier, he being a person with general authority to pay the company's debts, and the cashier used the money to pay the debts, the company would be liable. This result appears to me to be an anomalous one. Moreover, I cannot myself see how the decision in *B Liggett (Liverpool), Ltd v Barclays Bank, Ltd* could be supported, for the company's debts in that case were not paid by any agent of the company having authority to pay debts, but by the bank out of its own money.

Observing “that the precise ground upon which the equity is based has not been finally stated”⁶⁴ Greene MR considered that the married women and unauthorized borrowing cases together with *Sinclair v Brougham*⁶⁵ “illustrate the method by which equity in certain circumstances will assist a person who has no right at law but is able to show that money belonging to himself has gone to swell the assets of the person to or for whose benefit he has paid it.”⁶⁶

3 *Re Cleadon Trust Ltd—an evaluation of the different formulations of the equity*

Given the two formulations of the equity in *Re Cleadon Trust Ltd* the question is which is to be preferred? At the outset it is submitted that one's evaluation of these different formulations of the equity depends on one's view of the inter-relationship which the equity should have with the orthodox common law approach to the issue of the payment of another's debt. The crucial issue is whether the equity does mirror or should mirror the common law rules for payment of another's debt. By inserting a requirement that the unauthorized loan be used by a person having authority to pay debts, this is effectively what Clauson and Scott LJ have done. Indeed Lord Goff and Professor Jones criticize the approach taken by Greene MR on the basis that, it “fails to reconcile the equitable right with the rule that the mere payment to another's creditor will not alone entitle a stranger to repayment by the debtor.”⁶⁷

Should it make a difference, however, whether a legitimate debt is paid by a person having authority to pay that debt—albeit from funds derived from an unauthorized loan, or directly by the “lender” of that money? It will be recalled that no such distinction was

⁶⁴ Ibid, pp 306-307.

⁶⁵ Above, note 37. It will be recalled that this case involved the *ultra vires* banking activities of an insolvent building society and the claims of the shareholders and the *ultra vires* depositors to recover their money. Although *ultra vires*, the deposits had unquestionably increased the society's assets (in the balance sheet of March 31, 1910, shareholders' liabilities were stated as £1,053,728; depositor's liabilities as £10,784,323; and the assets as £11,966,443, p 411) and the House of Lords granted both groups a proprietary remedy pursuant to which they shared *pari passu* in the distribution of the society's assets.

⁶⁶ Above, note 7, p 301.

⁶⁷ Goff & Jones, *The Law of Restitution* above, note 54, pp 553-554. With respect to these learned authors, it is questionable whether this criticism is valid. Why should the equitable rule mirror the common law rule? Equity is not a mirror reflection of the common law.

made in *Jenner v Morris*⁶⁸ and for the writer, persuaded by the logic of Greene MR, such a distinction appears illogical. As Greene MR observed:⁶⁹

[T]his difference is not, in my opinion, one of substance. I cannot see that it makes any difference whether the agent obtains the money himself from the lender or requests the lender to make the payment direct to the principal's creditor. In each case, if the agent had in fact had authority, the principal would have become liable to the lender, and if the lender is entitled to recover in the one case in spite of the absence of authority, I can see no logical reason why he should not be similarly entitled in the other.

In both situations the assets of the debtor have been relieved of the burden of paying a legitimate debt. To that extent the debtor has been enriched.

A counter-argument is that whether logical or not this distinction is part of the law; if not before *Re Cleadon Trust Ltd*, then now. Not surprisingly some support for the "authorization" requirement is provided by the unauthorized loan cases. With the exception of *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* the cases do provide factual support; the "borrower" (whether it be the married woman, the agent of a principal having legal capacity to borrow, or the agent of a principal not having that capacity), had authority to pay legitimate debts. The strength of this factual support is questionable, however, for the simple reason that the wider formulation of the equity encompasses those situations in which there was authority to pay the debts—merely because the facts of these cases are within the "authorization" formulation is not evidence that the judges regarded the equity as restricted to that situation. As Clauson LJ acknowledged, the judges in these cases "do not draw specific attention" to the fact of authorization.⁷⁰ Arguably these judges perceived the equity as being wider in operation. Support for this last argument is provided both by the numerous formulations of the equity in which emphasis is placed on the factual payment of legitimate debts⁷¹ and the judicial observations which assume the application of the equity in situations in which the lender paid the money directly to

68 Above, note 26.

69 *Re Cleadon Trust Ltd* above, note 7, p 303.

70 Ibid, p 325.

71 See *Jenner v Morris* above, note 26; *Bannatyne v D & C MacIver* above, note 28; *AL Underwood Ltd v Bank of Liverpool and Martins* above, note 33; and *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* above, note 22. It may be argued, that by reference to factual payment of debts the judges were assuming that there had been a legal discharge of the debt. This argument appears to have been adopted by Lord Goff and Professor Jones—see their discussion of the speech of Lord Selborne LC in *Blackburn Benefit Building Society v Cunliffe, Brookes & Co* above, note 43—Goff and Jones, *The Law of Restitution* above, note 45, pp 554–555. With respect it is submitted that there is an equally strong argument that in referring to the factual payment of debts the judges were drawing a distinction between the discharge of a debt at common law and the factual discharge of a legitimate debt in which the creditor has been paid and equity regards the debt as discharged. In these cases loans which were invalid at common law (and in the case of the *ultra vires* loans invalid also at equity) were validated by the courts. Given that the courts were drawing a distinction between the validity of loans at common law and equity is it untenable to accept that they were also drawing a distinction between the discharge of debts at common law and their discharge at equity?

the creditor.⁷²

Notwithstanding the equivocal nature of the early cases, the majority in *Re Cleadon Trust Ltd* did adopt the authorization requirement. While this decision is not binding on New Zealand courts, as a decision of the English Court of Appeal, it is, notwithstanding the very strong dissent of Greene MR, entitled to respect. The actual result in that case also may have been right. Cleadon Trust Ltd was benefited by the actions of Creighton⁷³ but, as Scott LJ remarked, Creighton had been “flagrantly disregarding the provision of the Companies Act”,⁷⁴ and so may have acted officiously—a limitation to which the wider formulation of the equity advanced by Greene MR is subject.⁷⁵

As was noted earlier, it is suggested that the formulation of the equity advanced by Clauson LJ in *Re Cleadon Trust Ltd* was influenced by *Falcke v Scottish Imperial Insurance Co*⁷⁶. It will be recalled that he believed that any such equity as advanced by Creighton (and accepted by Greene MR) would be contrary to that case, saying:⁷⁷

The equity [advanced on behalf of Creighton] would ... appear to be founded on the mere fact that an *unsought benefit* has been conferred on the company. Since the decision in this Court in *Falcke v Scottish Imperial Insurance Co*, it is, I conceive, not open to this Court to hold that a person who by paying money confers an unsought benefit on another thereby entitles himself to an equitable right of recoupment as against that other. As Bowen L J said in that case: “The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone,⁷⁸ create any obligation to repay the expenditure. Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will.

Clauson LJ, however, saw “no difficulty in recognizing and enforcing against a man who has, by himself or his agent, used another’s money to pay his own debt, an equity to refund to that other a sum equal to the money of that other which he has treated as his own.”⁷⁹ The significance of *Falcke v Scottish Imperial Insurance Co* and the observation of Bowen LJ in that case to the formulation of the equity by Clauson LJ requires an examination of that case.

72 See *Jenner v Morris* above, note 26, p 362 per Lord Campbell LC; *Re Cork and Youghal Railway Co* above, note 38, p 759 per Lord Hatherley LC. In *Reid v Rigby & Co* above, note 55 Collins J (p 44) asked himself the question whether if the agent had “asked the plaintiff to pay the workmen, and the plaintiff had done so, could not the plaintiff have maintained an action against the [principal] to recover what he had paid?” The answer—“I am of opinion that he could.”

73 As recognized by Clauson and Scott LJ above, note 7, pp 319 and 309 respectively.

74 *Ibid*, p 311.

75 *Ibid*, pp 301–302.

76 Above, note 8.

77 *Re Cleadon Trust Ltd* above, note 7, pp 321–322 (my emphasis).

78 See Goff & Jones, *The Law of Restitution* above, note 45, p 337 n 49 on the significance of the positioning of this comma.

79 *Re Cleadon Trust Ltd* above, note 7, p 324.

Falcke v Scottish Imperial Insurance Co involved the unsuccessful claim of a Mr Emanuel to a lien over the proceeds of an insurance policy in respect of a premium which he had paid. Emanuel was the owner of the equity of redemption in a life assurance policy over the life of the Duchesse de Bauffremont. The equity of redemption was in turn mortgaged to a Falcke. In the mistaken belief that he had reacquired Falcke's interest in the policy and with the aim of preserving the policy, Emanuel paid the premium then due. On the insured's death Emanuel sought reimbursement of this payment and claimed a lien on the proceeds received by Mrs Falcke (as Mr Falcke's personal representative).

Not surprisingly the Court of Appeal unanimously rejected Emanuel's claim. As Cotton LJ observed,⁸⁰ "[i]t would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgage." While this observation may provide in essence the *ratio decidendi* of the Court's judgment, *Falcke v Scottish Imperial Insurance Co* has become famous for the general observations of the members of the Court, particularly those of Bowen LJ cited by Clauson LJ (and reproduced above), on Emanuel's claim that the mere fact of his benefiting Falcke by paying the premium and keeping the policy current justified relief. This observation of Bowen LJ can be interpreted as being hostile to any law of restitution. In his early writings Professor Birks expressed his fears that *Falcke v Scottish Imperial Insurance Co* could be a "final rejection of the uninvited intervenor's claims";⁸¹ indeed this is the effect which Clauson LJ attributes to it. But is this significance warranted? Emanuel was denied relief because Falcke's retention of the proceeds of the policy was not unjust; not only had Emanuel acted in his own self interest but recovery in that case would have undermined Falcke's security.⁸² The thrust of the observation by Bowen LJ is to refute the suggestion that the mere fact of the receipt of a benefit automatically raises an obligation upon the recipient thereof to pay for it. The wider equity advanced by Greene MR is consistent with the observation of Bowen LJ. The important limitation inherent in this wider equity is that the benefit is not conferred officiously—the mere fact that factually a legitimate debt has been paid is insufficient to warrant this relief.

Assuming that *Falcke v Scottish Imperial Insurance Co* is not the impediment to the wider equity which Clauson LJ believes it is, a question which should be asked is whether the wider equity advanced in this paper undermines the policy considerations underlying the orthodox common law approach to the payment of another's debts? I would suggest not. As noted at the outset of this article there are two important considerations underlying the orthodox common law solution—a fear that the debtor may lose any right of defence or counter-claim which he or she may have against the creditor and a fear of officious behaviour.

The wider equity is consistent with these concerns. The payer would bear the "burden of proving"⁸³ that he or she had factually paid a legitimate debt of the debtor. To the extent that the debt is disputed (or may be disputed) by the debtor it would not be a legitimate

80 *Falcke v Scottish Imperial Insurance Co* above, note 8, p 243.

81 Birks, "Negotiorum Gestio And The Common Law" (1971) 24 CLP 110, 111.

82 *Ibid*, p 112.

83 *Blackburn Building Society v Cunliffe, Brookes & Co* above, note 43, p 71 per Lord Selborne LC.

debt. In practice this may mean that all interested parties—that is the payer, creditor and debtor—must be involved in the proceedings. This was the situation in *Westpac Banking Corporation v Rae* in which the debtor was the second defendant. In cases such as *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*⁸⁴ where the court is unable to determine the legitimacy of the debt this equity would not be available. The payer would also have to show that he or she had not acted officiously in making the payment.

Because of these two limitations, the equity would have a relatively minor compass—in essence applying in those situations in which the payer has acted non-officiously (as by acting under a mistake) and the debtor has received a factual benefit in the form of the payment of a legitimate debt.

Conclusion

Returning to the problem with which this article commenced—should you be able to recover from me the money which you paid to ABC in discharge of my legitimate debt to it? As we have seen the orthodox answer of the common law and current restitutionary theory is no—even if ABC regards the debt as paid, legally it is not discharged until I ratify your actions, and until the debt is legally discharged I am not regarded as being enriched by your actions. These answers are appropriate if the debt is disputed by me or if I had a counter-claim or a right of set-off against ABC, but not where the debt is legitimate and I do not have a counter-claim or right of set-off. In the latter situation the debt is paid with the consequence that I have been enriched (in the sense of the preservation of my assets) by your actions.⁸⁵ The appropriateness of the orthodox legal answer is further challenged when any legal recourse you may have against ABC to recover the payment may not be able to provide you with relief. Such situations may be rare, but as shown by the concerns expressed by Holland J in *Westpac Banking Corporation v Rae*, they do occur. When they do, they demand an appropriate solution. The unauthorized loan cases indicate that equity provides, or is capable of providing, a solution which reflects the practicalities of the situation.⁸⁶

84 Above, note 9. It will be recalled that this case arose out of the failure of the Bank (the mistaken payer) to comply with a stop payment order given to it by the Royal British Legion Housing Association Ltd (the debtor) in respect of a cheque drawn by the debtor in favour of the defendant company (the creditor). To determine whether the Bank's actions in paying out on the cheque had the result of discharging the debtor's legitimate debt to the creditor the court would have had to interpret the building contract between the debtor and the creditor - a task which the court was unable to do or chose not to do.

85 See *Agip (Africa) Ltd v Jackson* above, note 9, in which the English Court of Appeal, in recognising that a customer of a bank had the right to bring an action for money had and received against the recipient of money, in circumstances where the money had been paid by the bank without the customer's authority and the bank had debited the payment against the customer's account, was influenced by the practicalities of the situation.

86 Such an equity would, of course, provide an exception to the orthodox common law approach. The history of Equity, however, is a history of the development of approaches and solutions to 'legal' problems which are different from those advanced by the common law. Indeed, in its original form in the context of unauthorized loans, this equity provided a means of conferring a remedy in a situation in which the common law was unable to do so.